STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MICHAEL SCOTT APGAR, Defendant-Appellant.	FOR PUBLICATION November 9, 2004 9:05 a.m. No. 247544 Wayne Circuit Court LC No. 02-012129-01 Official Reported Version

Before: Murphy, P.J., and O'Connell and Gage, JJ.

O'CONNELL, J. (*concurring*).

I concur with the Judge Gage's opinion. I write separately to say that the Supreme Court should reevaluate its decision in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).

Cornell conflicts with the plain and historic[1] reading of MCL 768.32(1), which provides that,

[1] *Cornell, supra* at 341, quoting *Hanna v People*, 19 Mich 316, 320-321 (1869), states,

> A version of MCL 768.32 has been in existence since 1846. 1846 RS, ch 16, § 16 provided:
>
> "[U]pon an indictment for any offense, consisting of different degrees, as prescribed in this title, the jury may find the accused not guilty of the offense in the degree charged in the indictment, and may find such accused person guilty of any degree of such offense, inferior to that charged in the indictment, or of an attempt to commit such offense."

Since 1846, Michigan law has permitted the jury to find an accused not guilty of the offense in the degree charged in the indictment and, at the same time, permitted the jury to find the accused person guilty of any degree of such offense inferior to that charged in the indictment. The facts in *Cornell* did not address a lesser degree of the same offense. This is why the facts of this case are distinguishable from *Cornell*.

(continued…)

> upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

The statute's plain language demonstrates that in cases involving third-degree criminal sexual conduct (CSC III) and first-degree criminal sexual conduct (CSC I), CSC III is an "inferior" offense to CSC I. Therefore, according to MCL 768.32(1), the trial court may instruct and convict on CSC III even if the prosecutor does not include it in his indictment for CSC I. Under *Cornell's* reasoning, however, it would not qualify as an "inferior" offense because it does not conform with the federal understanding of what constitutes a "lesser included offense." *Cornell, supra* at 356 n 9. I believe that the plain, unambiguous language of the Michigan statute should control. *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004). Moreover, it has always been the practice of trial judges to instruct on "inferior" offenses if the facts elicited at trial support the lesser charge. I would ask the Supreme Court to grant leave and reevaluate its decision in *Cornell*.

/s/ Peter D. O'Connell

(…continued)

While *Cornell* did address cognate lesser offenses that were not degreed offenses, in my opinion it did not change the law that has been in existence since 1846. In fact, in *Cornell, supra* at 347, the Court, referring to MCL 768.32, stated that "the statute did not leave the jury free to convict for any felony or misdemeanor: only degrees or an attempt of the offense charged could be considered." Therefore, this language leads me to conclude that the Supreme Court intended to leave in place the statute's plain, historic application to degreed offenses, just as the Legislature originally intended.